

UNITED STATES OF AMERICA
Before The
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Renewal of Experimental Classification and Fees)	Docket No. MC99-1
for Weight-Averaged Nonletter-Size)	
Business Reply Mail)	

Classification and Fees for Weight-Averaged)	Docket No. MC99-2
Nonletter-Size Business Reply Mail)	

OFFICE OF THE CONSUMER ADVOCATE
COMMENTS IN RESPONSE TO ORDER NO. 1233
AND ANSWERS TO MOTIONS
OF UNITED STATES POSTAL SERVICE
(April 5, 1999)

The Office of the Consumer Advocate (OCA), pursuant to Order No. 1233,¹ and to section 21(a) of the Rules of Practice of the Postal Rate Commission (Commission), hereby (1) comments on the issues identified in Order No. 1233 relating to the United States Postal Service request for a recommended decision in the above-captioned docket and (2) answers related motions concurrently filed by the Postal Service.

Background

The Postal Service filed on March 10, 1999, in Docket No. MC99-1, a request for a recommended Commission decision renewing its experiment, initially approved in Docket No. MC97-1, for an experimental classification and fees for weight-averaged

¹ "Notice and Order on Concurrent Requests for Recommended Decisions (and Related Motions) Affecting Certain Nonletter-size Business Reply Mail," issued March 16, 1999.

nonletter-size business reply mail.² The Postal Service requests that the Commission handle the proceeding under the Commission's experimental Rules 67-67d. Concurrently, also in Docket No. MC99-1, the Postal Service filed several motions: (1) a motion to establish procedural mechanisms concerning settlement, which includes a proposed Stipulation and Agreement and suggested procedural steps; (2) a motion for waiver of certain filing requirements incorporated into the Commission's rules of practice (relating to Rules 54 and 64 requiring information to be submitted in rate and classification proceedings); and (3) a motion for waiver of the Commission's Rule 67c(a)(1) (relating to unavailability of data otherwise required by Rule 64).

The Postal Service filing in Docket No. MC99-2 requests permanent classification and fees for weight-averaged nonletter-sized business reply mail at rates that are lower than the fees in the experimental phase. The proposed rates would eliminate the set-up fee and reduce the monthly sampling/accounting fee and the per-piece service fee. In support of its request, the Postal Service filed direct testimony and exhibits of four witnesses. The Postal Service also filed two motions with its request: one for waiver of certain filing requirements in Rules 64 and 54 pertaining to information required to be submitted with requests for changes in rates and fees, and the other motion requesting protective conditions for Workpaper I of witness Shenk.

Thereafter, the Commission's Order No. 1233 provided for the filing no later than April 5, 1999, of comments on the appropriateness of considering Docket No. MC99-1

² The Postal Service also filed on March 10, 1999, a request for a permanent classification and fees for weight-averaged non-letter size business reply mail in Docket No. MC99-2. The Commission's Order No. 1233 noticed and established preliminary procedures in both dockets, MC99-1 and MC99-1, but did not consolidate the two proceedings.

under Commission Rules 67-67d relating to experiments, answers to the Postal Service motions, and comments on the advisability of setting tentative procedural dates in Docket No. MC99-1.³ The Commission also noticed the eleven procedures which the Postal Service proposed in connection with its proposed settlement of Docket No. MC99-1.⁴ Finally, the Commission stated that the Postal Service's request, testimony, and proposed Stipulation and Agreement shall be entered into the record on April 6, 1999, if no objection to that procedure is filed by April 5, 1999.⁵ OCA hereby responds to Order No. 1233.⁶

Discussion

I. Appropriateness of Considering Docket No. MC99-1 Under Commission Rules 67-67d Relating to Experiments

The OCA believes it is appropriate to consider the Postal Service request for an extension of the experimental service recommended in Docket No. MC97-1 pursuant to Rules 67-67d of the Commission's Rules of Practice. The rules facilitate expeditious action on experimental matters where the attributes set out in Rule 67(b) are present.

³ Order No. 1233 at 12, ¶¶ 8-10.

⁴ Id. at 11, ¶ 5.

⁵ Order No. 1233 also requested answers to the Postal Service's motion in Docket No. MC99-2 requesting protective conditions for Workpaper I of witness Leslie Schenk whose testimony was filed with the request in that docket. OCA responded to that motion on March 26, 1999, stating OCA has no objection to the suggested protective conditions. See "Motion of the Office of the Consumer Advocate to Obtain Expedited Access to Schenk Workpaper I and Response to Motion for Protective Conditions" at 3. The OCA motion for access under protective conditions was granted on March 29, 1999, but the Presiding Officer has not yet formally ruled on the Postal Service motion.

⁶ The Commission's ordering paragraph 9 requested answers to motions referenced in the body of the order. The body of the order also referenced the Postal Service motion in Docket No. MC99-2 for waiver of certain filing requirements relating to Rules 54 and 64. It would be premature to take a position on the suitability of the filing requirements under the referenced rules in that docket pending further review of the filing and opportunity for discovery.

Those attributes are present here: the proposed renewal continues the novel change in classification and fees of the experiment; the impact of extending the experiment is minimal and less than the impact would be on mailers if the experiment terminated; the data plan can be easily continued during the extension; and the duration of the requested extension is intended to coincide with completion of the request for a recommendation on the permanent classification and fees.

These conclusions are supported by the following factors which justify application of the experimental rules in this proceeding. The Postal Service claims additional computer-related work is necessary to finalize the operation of this service and that management assignments will be incomplete by the end of the current experiment. Also, the Postal Service has filed a request for permanent classification and fees for this service including testimony and exhibits supporting the continuation of this service at the end of the experiment. Additionally, the weight-averaging portion of the ongoing experiment which the Postal Service asks to extend appears to be functioning as originally anticipated. Moreover, the cost of the alternative fees to the Postal Service customers now participating in the experiment will be significant as they will revert to an eight cents per piece cost for manual processing if the experiment is not renewed pending action on the Postal Service request for permanent authorization. For these reasons, it is appropriate to consider the request in Docket No. MC99-1 under the rules relating to experiments.

II. Motions for Waiver of Certain Filing Requirements Under Subsections of Rules 54 and 64 and Rule 67c(a)(1)

The Postal Service requests waiver of the filing requirements under Rules 64(b)(3), 64(d), 64(h), 54(b)(3), 54(d), 54(f)-(h), 54(i), 54(j), 54(k), and 54(l)(ii). OCA has no objection to waiver of these rules. OCA, however, reserves the right to conduct discovery in Docket No. MC99-1, including discovery of any information that would have been filed but for the requested waivers.

With respect to the Postal Service's separate motion for waiver of the requirements of Rule 67(c)(a)(i) having to do with submission of a data collection plan, OCA concurs that it is not necessary for the Postal Service to submit a new data collection plan. To the extent, however, that the Postal Service's motion also asks to be relieved of the data collection requirements currently imposed by the Commission's orders in Docket No. MC97-1, the OCA opposes the Postal Service motion. The potential for delay in implementing permanent classification and fees during the extension period requested in Docket No. MC99-1 is significant. The Postal Service has requested a recommendation that it be authorized to continue the service on an experimental basis potentially through February 29, 2000. Given that resolution of implementation issues in weight-averaging may involve the Postal Service computer system, it is possible that a changeover to permanent classification may be further delayed by the Y2K computer system freeze announced by Deputy Postmaster General Coughlin on March 9, 1999. That freeze is in effect through March 31, 2000, subject to a complicated exception process.

In light of these factors, it would be prudent to require the Postal Service to continue the data collection already underway as a result of the Commission's order in Docket No. MC97-1.

III. The Proposed Stipulation and Agreement and the Postal Service Request for Procedures

OCA intends to consider seriously the proposed Docket No. MC99-1 stipulation and agreement and to discuss the prospects for settlement with the Postal Service and other participants prior to the April 6 prehearing conference. OCA has already served two sets of interrogatories to the Postal Service to elicit information relative to settlement of Docket No. MC99-1; these interrogatories are currently outstanding and the responses may impact OCA's view of the settlement offer. The OCA is not now prepared to either object to or support the stipulation and agreement pending further discussions with the Postal Service and interested parties to the proceeding.

The Commission has provided notice of eleven procedural steps requested by the Postal Service and has indicated that participants should comment specifically on the first of the eleven steps, i.e., that the Postal Service's filings to date be admitted into the record of the proceeding. These consist of the Postal Service request with associated attachments, the direct testimony of witness James M. Kiefer, and a stipulation and agreement signed only by the Postal Service. The OCA has no objection to the admission of the Postal Service's request, including the associated attachments, or to the admission of Mr. Kiefer's direct testimony; both with the understanding that participants will have full opportunity for discovery, cross-

examination, briefing and other procedures as may be necessary to develop a full record in this case.

The OCA does, however, object to the admission of the Postal Service's proposed stipulation and agreement. The OCA was not involved in any pre-filing discussions with the Postal Service, or otherwise made aware of the terms which the Postal Service proposes in this proceeding, until the stipulation and agreement was filed on March 10, 1999. The proposed settlement merely implements the relief sought by the Postal Service in its request. As previously noted, the OCA intends to pursue settlement discussions with the participants, but considers it premature to admit the unilateral stipulation and agreement into the evidentiary record of this proceeding.

With respect to the remaining ten items proposed by the Postal Service and reflected in Appendix A to Order No. 1233, the OCA notes that item nos. 2-5 were resolved by Order No.1233. The OCA opposes item no. 6, as it would be premature to close the record even if no specific objection to the experimental classifications and fees are filed on April 5, 1999. The OCA, and perhaps other participants, may seek discovery and pursue issues related to the terms and conditions of a continued experimental period, but may not yet have specific issues that they intend to contest.

With respect to item no. 7, the OCA has commenced discovery. The date proposed by the Postal Service for concluding discovery, April 9, 1999, is too abrupt; reasonable dates, as proposed below, can and should be established at the prehearing conference. Similarly, reasonable dates should be set for further proceedings, including settlement discussions. The limited procedural dates suggested by the Postal Service in item no. 8 should be rejected.

Finally, item nos. 9-11 are all related to procedures based on action on the request and the stipulation and agreement depending on whether the Commission finds issues of material fact in dispute. This is again too restrictive. In the absence of a settlement among the participants there may be issues that are not, strictly speaking, issues of material fact, but for which traditional procedures are best suited rather than proceeding to provisionally submit the record to the Commission as the Post Service suggests. For instance, the appropriate rate during the extended experimental phase may become an issue that participants may choose to litigate.

IV. Advisability of Setting Tentative Procedural Dates in Docket No. 99-1

Absent a settlement agreement among all participants by the time of the prehearing conference on April 6, 1999, it will be advisable for the Presiding Officer to provide opportunity for further settlement discussions. The procedure suggested below will allow completion of even a full-blown proceeding prior to the termination date of the experiment on June 7, 1999, without prematurely submitting the Postal Service's proposed stipulation and agreement to the Commission.

In the event a settlement is not reached by the prehearing conference, OCA suggests the following schedule for Docket No. MC99-1:

April 16, 1999	Complete discovery concerning direct case of Postal Service -- (seven days longer than proposed by the Postal Service to provide opportunity to consider responses to initial discovery requests and conduct further settlement discussions)
April 20, 1999	Target date for completion of settlement discussions and filing of signed Stipulation and Agreement

April 21, 1999	Indication of need for cross-examination and hearing and identification of amount of oral cross-examination
April 27, 1999	Hearings, if necessary, for cross-examination on the Postal Service case-in-chief
April 30, 1999	Submittal of participants' cases-in-chief or other pleadings in support of participant's position
May 7, 1999	Hearing on participants' case
May 12, 1999	Rebuttal to participants' cases, if requested
Expedited briefing dates to be determined.	

V. Preliminary Dates in Docket No. MC99-2

The Commission's Order No. 1233 also requested comment as to whether Docket No. MC99-2 might be an appropriate candidate for formal settlement procedures. OCA is not prepared at this time to urge settlement discussions in Docket No. MC99-2. Discovery is necessary regarding the marketing study, cost data, data gathering plan results, and the permanent operation of the weight-averaging process. The Presiding Officer should therefore consider establishing dates for discovery and hearings on the Postal Service case-in-chief at the prehearing conference. Informal settlement discussions can, of course, be undertaken by the participants at any time.

Conclusion

In conclusion, and for the reasons stated above,

1. it is appropriate for the Commission to consider Docket No. MC99-1 under the Commission Rules 67-67d relating to experiments;
2. OCA does not object to the waiver of filing requirements under subsections of Rules 54 and 64, subject to retaining the right to discovery of information otherwise required by those rules;
3. OCA does not object to the motion for waiver of Rule 67c(a)(i) requiring the filing of a data plan, subject to the Postal Service continuing the collection of data under the current plan;
4. OCA does not object to entering into the record the Postal Service request and attachments and the filed testimony, but OCA does object to entering into the record the Postal Service's proposed stipulation and agreement, subject to further opportunity for settlement discussions, as necessary, following the initial discussions now scheduled to commence immediately prior to the prehearing conference;
5. it would be premature to close the record even if no specific objections to the experimental classifications are raised by April 5, 1999;
6. the procedural dates proposed above by OCA are less restrictive than several of the dates proposed by the Postal Service, particularly if settlement of the issues cannot be reached, and should be adopted;

7. OCA believes it is premature to establish procedures for settlement discussions in Docket No. MC99-2.

Respectfully submitted,

OFFICE OF THE CONSUMER ADVOCATE

Ted P. Gerarden
Director

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.

KENNETH E. RICHARDSON
Attorney

Washington, D.C. 20268-0001
April 5, 1999